

**[J-136-2005]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT**

CAPPY, C.J., CASTILLE, NEWMAN, SAYLOR, EAKIN, BAER, JJ.

COMMONWEALTH OF PENNSYLVANIA,	:	No. 464 CAP
	:	
Appellee	:	
	:	Appeal from the Judgment of Sentence
	:	entered on 3/13/03 in the Court of
v.	:	Common Pleas, Criminal Division of
	:	Lehigh County at No. 3652/2001
	:	
RAMON SANCHEZ,	:	
	:	
Appellant	:	ARGUED: December 6, 2005

CONCURRING OPINION

MADAME JUSTICE NEWMAN

DECIDED: September 27, 2006

I join the Majority Opinion but write separately to articulate my dissatisfaction and concern regarding the manner in which the Commonwealth effectuated pre-trial disclosure of the “seventeenth body” statement of Appellant. Upon leaving the scene of the crime with Sashana Young and AnnJulie Torres, Appellant uttered this statement, saying “[t]his is my seventeenth body, I’ll never get caught.”

The Commonwealth notes that it disclosed the seventeenth body statement to defense counsel “while on a bathroom break at some point before the first trial listing of this case in August 2002.” Brief for Appellee at 28 (citing N.T. 11/10/03 at 37). My concern is compounded further by the fact that the trial court found that “[d]efense

counsel did not recall having that conversation with the prosecuting attorney in the lavatory.” Trial Court Opinion at 58.

The trial court described the Commonwealth’s mode of disclosure as “less than exemplary,” and the Majority portrays it as “unusual.” I find these descriptions to be charitable. In my opinion, the Commonwealth’s compliance with the mandatory disclosure rule was serendipitous as best, having occurred during a bathroom break when defense counsel’s visit happened to coincide with that of the prosecutor.

I am troubled by the fact that in addition to the “seventeenth body” statement, there were other instances of undisclosed prejudicial statements of Appellant: “the Commonwealth’s apparent withholding of other, similar inculpatory statements by Appellant would tend to support a finding of non-disclosure with regard to the ‘seventeenth body’ statement as well.” Majority Opinion at 22.

The Commonwealth admitted that it knew of other detrimental statements made by Appellant to AnnJulie Torres or Sashana Young, none of which it disclosed to defense counsel: (1) “Do you want to see me kill him?”; (2) “I have to finish this”; (3) “That felt good”; and (4) other statements made in the holding cell at the Allentown Police Department. Brief of Appellee at 29.

Pa.R.Crim.P. 573(B) provides, *inter alia*, for mandatory disclosure:

- 1) *Mandatory*. In all court cases, on request by the defendant, and subject to any protective order which the Commonwealth might obtain under this rule, the Commonwealth shall disclose to the defendant's attorney all of the following requested items or information, provided

they are material to the instant case. The Commonwealth shall, when applicable, permit the defendant's attorney to inspect and copy or photograph such items.

* * *

(b) any written confession or inculpatory statement, or the substance of any oral confession or inculpatory statement, and the identity of the person to whom the confession or inculpatory statement was made that is in the possession or control of the attorney for the Commonwealth[.]

As the Majority acknowledges, the fact that there were other undisclosed damaging statements makes Appellant's contention that the "seventeenth body" statement was not disclosed to counsel more credible than it might be otherwise. In this same vein, the fact that defense counsel does not remember being told about the "seventeenth body" statement buttresses the claim of Appellant of a disclosure violation. Further, the explanation of the prosecutor as to why he did not turn the statements over to defense counsel is also troubling: "the majority of discovery had been provided before [I] was assigned the case [and] it was my impression that [defense counsel] had -- you had the substance of what occurred. You did not have my notes." Brief for Appellee at 29, 30 (citing N.T. 11/10/03 at 61).

Although I have a high degree of skepticism regarding the Commonwealth's compliance with Pa.R.Crim.P. 573(B), I agree with the disposition of the Majority for the following reasons: (1) the trial court properly weighed the probative value of the evidence against its potential for unfair prejudice; (2) the trial court made factual findings that supported the position of the Commonwealth that it disclosed the "seventeenth body" statement in the lavatory, and, because the trial court is the fact-finder, we accord deference to its findings with respect to credibility, Commonwealth v. Gibson, 720 A.2d

473, 480 (Pa. 1998); (3) the trial court's curative instructions to the jury were appropriate and adequate; (4) the trial court's decision to deny the remedy sought by Appellant of a mistrial was within its discretion, Commonwealth v. Crawley, 526 A.2d 334, 342 (Pa. 1987); and (5) even assuming that the trial court erred in permitting testimony regarding the "seventeenth body," the error was harmless because of the overwhelming evidence of Appellant's guilt, Commonwealth v. Morris, 519 A.2d 374 (Pa. 1986).

Finally, I note that Appellant did not provide any legal support for his argument that the "seventeenth body" statement violated the disclosure rule, offering only the bald assertion that "[t]hese were all statements with the potential negative effect on the defense, none of which were disclosed. Its [sic] borders on prosecutorial misconduct." Brief for Appellant at 23-24.

Accordingly, I join the Majority in affirming the judgment of sentence.

Mr. Chief Justice Cappy joins this concurring opinion.